



REPUBLIC OF KENYA



**Wairimu & another v Attorney General & 4 others (Judicial Review E038 of 2023)
[2023] KEHC 20850 (KLR) (Judicial Review) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20850 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E038 OF 2023
JM CHIGITI, J
JULY 20, 2023**

BETWEEN

**YVONNE WAIRIMU 1ST APPLICANT
ANN NJERI 2ND APPLICANT**

AND

**THE HON THE ATTORNEY GENERAL 1ST RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT
THE INSPECTOR GENERAL OF POLICE 3RD RESPONDENT
THE DIRECTOR OF CID 4TH RESPONDENT
THE CHIEF MAGISTRATE JKIA 5TH RESPONDENT**

JUDGMENT

1. The Applicant herein filed an application by way of a Notice of Motion dated 23rd March 2023, Under S.8 (2) *Law Reform Act* Cap 26 Laws of Kenya, Order 53 Rules 1,2 and 3 of *Civil Procedure Act* Cap 21 Laws of Kenya and S.65 of *the Constitution* of Kenya seeking Orders:

1. That this Honorable court be pleased to issue Orders of Certiorari directed against the 2nd respondent their servants and/or agents or any other person acting under their authority to bring before this court for purpose of being quashed the decision by the respondent to charge the applicants with a criminal case which was registered before the 5th respondents court as criminal case no. E064 of 2022.



2. That this Honourable court be pleased to issue orders of prohibition directed to the 5th respondent, prohibiting the 5th respondent, servants and/or agents or any other officers acting with its authority from proceeding with the prosecution, institution of criminal proceedings /and or taking plea against the applicants/subject on matters regarding the aforesaid charge.
 3. That this Honourable court be pleased to issue conservatory orders directed against all the respondents prohibiting them from instituting, prosecuting in any other way continuing with any proceedings in the matter herein above stated as the same constitutes an abuse of the court process, is arbitrary, capricious and brought male fides by the respondents and violates the applicants constitutional rights to a fair trial and the prosecutions intention to enforce.
2. The Application is founded on the grounds set out on the face therein and by a Statement of facts and verifying affidavit sworn of Yvonne Wairimu dated 21st March, 2023.
 3. The Applicants aver that the charges arising herein were investigated by the 3rd and 4th Respondent herein and consequently the Applicants were charged in court Vide criminal case No. E5502 of 2022 pending at Makadara law courts on 5th December, 2022. (Annexed herein and marked YW/1 is a copy the charge sheet dated 5th December, 2022)
 4. The matter has been mentioned severally for pre-trial conference and a hearing date set for the 14th April, 2023 before the Hon Lewis Gacheru Senior Principal Magistrate Makadara law courts.
 5. Despite the proceedings in Makadara law courts, the 2nd and 3rd Respondents proceeded to charge the Applicants with similar charges at the JKIA law courts vide criminal case no. E064 of 2022.(Annexed herein and marked YW/3 is a copy the charge sheet dated 13th December, 2022)
 6. Having regard to the pendance of criminal case no. E5502 of 2022 before the chief magistrate in Makadara in Nairobi, the commencing of Criminal proceedings against the subjects herein over the same charges at the JKIA law courts is unjust and a true circus and violation of the subjects' constitutional rights to freedom and to a fair trial.
 7. The prosecution of Criminal Case No. E064 OF 2022 being before the principal Magistrate JKIA law courts is unjustifiably accentuated by malice and amounts to a total abuse of the due process considering all the circumstances.
 8. The Applicant contends that unless prohibited, such prosecution will be oppressive, unjust and in complete abuse of the due process of the law.
 9. Throughout the proceedings in the in JKIA criminal case no. E064 OF 2022 the 2nd, 3rd and 4th Respondents have never brought to the 5th Respondent herein attention of the ongoing case before the Makadara chief magistrate.
 10. The commencing of the similar criminal proceedings at JKIA law courts will greatly injure the Subject and is not in the interests of justice.
 11. That there is absolutely no just course or reason for the commencement of the criminal proceedings at the JKIA law courts which are extremely oppressive and arbitrary in nature.



12. The Respondents herein and specifically the 3rd respondent has acted in a most unfair manner against the Subjects herein exposes Ex-parte applicants to double jeopardy and violates their fundamental rights.
13. The Advocates for the Ex-parte applicants have unsuccessfully applied for the charges against the Ex-parte Applicants in criminal case E064 of 2022 at the JKIA law courts be dismissed by adducing satisfactory reasons to the court as to why the matter offends the Doctrine of Res Sub Judice and against double jeopardy and further the circumstances surrounding the charges but the plea fell on deaf ears.
14. The institution of similar criminal proceedings against the Exparte Applicants the facts available to the prosecution are arbitrary, extremely malicious, oppressive and an abuse of the due process of the law and natural justice and hence a further reason as to why this application ought to be allowed.
15. The Applicant sought reliance in the case of Joram Mwenda Guantai K. The Chief Magistrate Civil Appeal No. 228 of 7003 [2007] 2 EA 170 where the Court of Appeal stated as follows:

“It is trite that an order of prohibition from the high court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, act to correct the course practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings..... Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression .if the prosecution amounts to an abuse of the court and is oppressive and vexations, the judge has the power to intervene and the high court has the inherent power and the duty to secure fair treatment for all persons who are brought before the court or to subordinate court and to prevent an abuse of the process of the court.”
16. The Applicant submitted that the Bill of Rights under our constitution guarantees the right to a fair administrative action and the right to equal application and protection of law. Upon a violation of any of the said rights, the High Court has a constitutional mandate (as opposed to the common law) to invoke judicial review jurisdiction (under Article 23(3) of *the Constitution*) to check excess of power.
17. The Applicant does not seek for this court to usurp the powers of the 2nd, 3rd and 4th Respondents in making the decision to charge the Applicants in JKIA Chief Magistrate’s Court Case No. EO64 of 2022 or to review the merits of the said decision, but rather, the decision making process as clearly demonstrated in the Statements of Facts. This challenge is founded on the considered view that the decision is wrong, improper; an abuse of office is capricious and will lead it as abuse of the due process.
18. The Applicants submitted that they are aggrieved by the decision making process and the recommendations to commence similar criminal charges at the JKIA Chief Magistrate’s Court being criminal case No. EO64 of 2022 and Makadara Chief Magistrate court Case No. E5502 of 2022.
19. The Applicants are aggrieved by the fact that the process followed was neither fair nor reasonable given the similar facts and circumstances and the failure to appreciate and consider that the two matters emanated from similar facts and circumstances. It is the contention by the Applicants that the decision is founded on malice by the servants and/or agent of the 3rd and 4th Respondent and hence improper.
20. In instituting the criminal case No. EO64 of 2022 before the magistrate at the JKIA law courts the 2nd, 3rd and 4th Respondents failed to appreciate the above facts hence their decision as arrived at was not based on reason or reasonable grounds or suspicion.



21. Further, the 5th Respondent failed to appreciate the fact that the Applicants/subjects were already charged with a similar offence arising from the same facts before the chief magistrate in Makadara (Case No. E5502 of 2022 and the trial is still pending.
22. It is the Applicants contention that the 2nd, 3rd and 4th Respondent did not act fairly in arriving at their decision to institute criminal proceedings against them and failed to appreciate that the Applicants had already been charged and released on cash/bond with a similar offence having similar facts before the chief magistrate in Makadara before proceeding to institute similar charges before the JKIA law courts. That in the alternative the 2nd, 3rd and 4th Respondent made the decision in capricious and arbitrary manner and the same is bound to prejudice the subjects herein.
23. The Applicants submit that proceeding with the criminal charges in Criminal case No. E064 of 2022 before the Chief Magistrate JKIA while having the pendance of the criminal case in Makadara Chief Magistrate court being criminal case E. 5502 of 2022 is an abuse of court process, unjust and true circus and violation of the Applicant's constitutional rights to fair trial. Citing the case of Stephen Somek Takwenyi & Another vs. David Mbutia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009 with respect to the Court's power to prevent abuse of its process.
24. The institution of the two cases creates a factual scenario where the 2nd respondent is pursuing the same matter by two court process. In other words, the 2nd, 3rd and 4th Respondent by the two court process is involved in some gamble; a game of chance to get the best in the judicial process. Relying on Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR where it was held that:

“.... Litigation is not a game of chess where players outsmart themselves by dexterity of putpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. Pursuing two processes at the same time constitutes and amounts to abuse of court/legal process.....”
25. The Applicants further submitted that the illegality, irrationality and procedural impropriety in the decision making process of the 2nd, 3rd and 4th Respondents to prosecute the applicants in E064 of 2022 before the Chief magistrate JKIA law Courts articulated hereinabove renders the prosecution of the subjects bad in law as it offends the doctrine of Res Sub Juice and against the principles of double jeopardy.

The Respondent's case

26. The 2nd Respondent in response filed grounds of opposition dated 14th July, 2023.
27. The 2nd Respondent contends that the 1st, 3rd, 4th and 5th Respondent have no oversight role over the 2nd Respondent as the 2nd Respondent enjoys decisional independence in deciding whether to charge a suspect or drop charges. This is a fact enshrined under Article 157(10) of *the Constitution* of Kenya, 2010 and the *Office of the Director of Public Prosecutions Act*, 2013.
28. The 2nd Respondent avers that it is in the interest of justice that people who are investigated as suspects by the 3rd and 4th Respondents and charged by the 2nd Respondent ought to be tried in a court of law thereby allowing the 2nd Respondent to discharge the burden of proof.
29. The rules of natural justice apply in a criminal matter and thus, the state has the onus of proving its case beyond reasonable doubt in a trial where the accused person enjoys the presumption of innocence until



- proven otherwise. That the existence of the presumption of innocence is a safeguard for the accused person.
30. The 2nd Respondent states that it is in the interest of justice that this Honourable Court allow the Honourable Chief Magistrate JKIA Law Court adjudicate the matter before it, as that court is a lawful court well quipped to adjudicate the case. It is not in the interest of justice that the matter be halted.
 31. The right to a fair hearing is a fundamental right that no person can be denied in Kenya, it is a non-derogable right.
 32. The 2nd Respondent avers that the applicant has not illustrated to this Honourable Court how or if at all her right to a fair trial has been curtailed by any of the Respondents herein.
 33. The relief seeking that the 2nd Respondent stops prosecuting the lower court criminal matter is a non-starter. The 2nd Respondent subjected the evidence it received from the investigators to the evidential test and the public interest tests as established in the Decision to Charge Guidelines and the National Prosecution Policy, 2007. This decision to charge is a preserve of the DPP as per Article 157 of *the Constitution* of Kenya, 2010.
 34. That the relief seeking an order of certiorari to quash the charge sheet dated 13th December 2022 in the Principal Magistrate's Court vide JKIA Criminal Case Number E064 of 2022 and Makadara Criminal Case No. E5502 of 2022 by dint of the fact that he alleges that he is charged with the same offences in Criminal Case No. E064 OF 2022 is a gross misrepresentation of facts and the law in this case as the charges may be similar but the circumstances and the narcotic substances in the matter are different.
 35. The 2nd Respondents aver that the relief seeking an order of certiorari directed to the 2nd, 3rd and 4th Respondents herein to bring before this Honourable Court for the Purposes of being quashed their decision to charge and prosecute the Applicant vide criminal case No. E064 OF 2022 is against the dictate of *the constitution* as outlined in Article 157 of the Republic of Kenya, 2010 as state powers of Prosecution are vested in the Honourable Director of Public Prosecutions and may only be challenged where it is proved that the Honourable Director of Public Prosecutions abused his powers substantively or procedurally. This has not been canvassed and has therefore not been proved.
 36. The 2nd Respondent further contends that the relief seeking that the matter in the lower court be stayed via conservatory orders seeks to frustrate the victim(s) of the crimes propagated by the Applicants and frustrate the efforts by the Respondents all of whom are state officers whose only crime herein is to dutifully execute their Constitutional and statutory duties.
 37. The 2nd Respondent may institute criminal proceedings against an accused person in 2 different courts for 2 different crimes occasioned by different circumstances.
 38. The Court notes that the 1st, 3rd, 4th, and 5th Respondents did not file any responses.

Analysis and Determination

39. I have very carefully considered the Notice of Motion dated 23rd March 2023, the Statement of facts and verifying affidavit, the 2nd Respondents' grounds of opposition and parties submissions and from the above, only one issue arises for determination namely; whether the Applicants have laid out a case for the grant of Orders sought in the instant Application.



40. The jurisdiction of this court in determining applications for Judicial Review is circumscribed. As was held by the Court of Appeal in *Kenya National Examination Council Vs-Republic Exparte Geoffrey Gathenji & 9 others* Civil Appeal No. 266 of 1996:

“That now bring us to the question we started with, namely, the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against Public bodies such as the council in this case. What does an order of Prohibition do and when will it issue? It is an order from the High Court directing on inferior tribunal or body which forbid the tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the Land. It lies, not only for excess of jurisdiction or absence of it but also for departure from the rules of natural justice. It does not, however, lie to correct the course, practice and Procedures of an inferior tribunal or a wrong decision on the merits of proceedings – See Halsbury’s Law of England, 4th Edition Vol 1 at Pg. 37 paragraph 128”.

41. In respect of an application seeking to quash the decision of the Director of Public Prosecution to charge, the court in *Joram Mwenda Guantai -Vs- the Chief Magistrate* [2007] 2 EA 170 held thus:

“The High Court has inherent jurisdiction to grant an order of Prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High court has an inherent power and duty to serve fair treatment for all persons who are brought before the court or to a subordinate court to prevent an abuse of the process of the court.”

42. The Court in *Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd vs. MW (Minor suing thro’ next friend and mother (HW))* [2016] eKLR defined ‘conservatory orders’ as follows: -

“5. A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.”

43. In *Judicial Service Commission v Speaker of the National Assembly & Another* [2013] eKLR the Court had the following to say about the nature of conservatory orders: -

“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under *the Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

44. The principles in regard to the granting of interim or conservatory orders were outlined by the Supreme Court in the case of *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others*, Supreme Court Application NO. 5 of 2014 (2014) eKLR, where the Court held that:-

“(85) These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on



the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.

(86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

45. In the present application, the Applicants stated that they are aggrieved by the decision making process and the recommendations to commence similar criminal charges at the JKIA Chief Magistrate’s Court being criminal case No. EO64 of 2022 and Makadara Chief Magistrate court Case No. E5502 of 2022.

46. The State’s prosecutorial powers are vested in the DPP under Article 157 of *the Constitution*, the pertinent part being Sub-Article 6 which provides as follows;

“(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

a. institute and undertake criminal proceedings against any person before any court, other than a court martial, in respect of any offence alleged to have been committed.”

47. Such exercise of power is not subject to the direction or control by any authority as is stipulated under Article 157(10) as follows:

“(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

48. However, the discretionary power vested in the DPP is not a free hall and such discretion must be exercised in accordance with the provisions of *the constitution*. It must be exercised reasonably and within the law. It must be exercised in a way that promotes the objects laid out in section 4 of the ODPP Act. These objects are ; the diversity of the people of Kenya, impartiality and gender equity, the rules of natural justice, promotion of public confidence in the integrity of the Office.

49. Fundamentally, a fair and impartial trial or investigation has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. All investigations and a fair trial must translate into a process that is conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favouritism. The processes usually culminate in sanctions that many a times can be very hefty. The process must at all times ensure that no miscarriage of justice or prejudice is caused to the suspect or the accused person as the case may be.



50. The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person.
51. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR). The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated worldwide but, by the fact that under article 25 (c) of our constitution, it is among the fundamental rights and freedoms that may not be limited.
52. A criminal trial premised on unfair or a decision to charge arrived at unfairly and without any reasonable basis would in my view open the door to an unfair trial.
53. Article 47 (1) of *the Constitution* states as follows;
- “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”
54. Article 47(2)
- “If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”
55. Article 50(1) of *the Constitution* makes provision for fair hearing. The Article is to the effect that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
56. The right to fair hearing is evidently closely intertwined with fair administrative action.
57. The provisions of *the Constitution* conferring powers upon the High Court to grant such remedies as certiorari, prohibition, mandamus or permanent stay of proceedings are a device that is tailored at ensuring that fair administrative action and the rule of law are promoted at all times.
58. In this case the Applicants have been charged with:-
- i. Trafficking of Narcotic Drugs Contrary to Section 4a As Read With Section 3(2) of *Narcotic Drugs And Psychotropic Substances (control) Act*, 1994 vide criminal case no. E5502 of 2022 pending at Makadara law courts. Particulars of the offence read as follows: - Yvonne Wairimu & Ann Njeri: On 3rd December, 2022 at Zimmerman area in Kasarani Sub-County within Nairobi County were found trafficking by way of conveying narcotic drugs namely cannabis sativa (bhang) to wit three full and a half full sacks with a street value of Kshs. 1.2 Million in contravention of the said Act. Witnesses : 1. IP Arvin Mwangi, 2. S/SGT Granga, 3. John Karanja (Annexed and marked YW/1 is a copy the charge sheet dated 5th December, 2022)
 - ii. Trafficking of Narcotic Drugs Contrary to Section 4a (ii) Of *Narcotic Drugs And Psychotropic Substances (control) Act*, 1994 at the JKIA law courts vide criminal case no. E064 of 2022. Particulars of the offence read as follows: - Yvonne Wairimu, Ann Njeri, Alice Wairimu and Joseph Kariuki: On 3rd December, 2022 at Zimmerman area in Kasarani Sub-County within Nairobi County trafficked narcotic drugs namely cannabis sativa (bhang) to wit



149,000 grams with a market value of Kshs. 4,470,000/= Million by storing in a house concealed in three and a half sacks in contravention of the said Act. Witnesses : 1. IP Arvin Mwangi, 2. SGT Stephen Mwangi, 3. John Karanja (Annexed and marked YW/3 is a copy the charge sheet dated 13th December, 2022)

59. It is crystal clear that requiring the Applicants to appear in two courts for similar crimes for hearing on the same issues is not only unfair but a breach of their fundamental rights and freedoms as envisaged by the Articles 25 (c), 47 (1) & (2), 50 of the Kenyan Constitution and Section 4 of the Fair Administrative Actions Act.
60. The Applicants are faced with a situation of appearing in two different for hearing in both courts, leading to a likelihood of the two processes giving rise to two different outcomes as they would be tendering similar evidence and defending two suits which is also costly. To allow such a process to proceed concurrently would offend Article 27 of *the Constitution* which guarantees an accused person to the benefit before the law.
61. The Applicants are entitled to the right to fair hearing and right to fair administrative action that is expeditious, efficient, reasonable and procedurally fair.
62. In Civil Appeal 52 of 2014 Judicial Service Commission v Mbalu Mutava & another (2015) eKLR Court of Appeal addressed itself on the above. The court held that: -

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the bill of rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”
63. In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the Court or that the ends of justice require that the proceeding ought to be quashed.
64. Article 23 (3) of *the Constitution* provides that in any proceedings brought under Article 22, a Court may grant appropriate relief, which includes but is not limited to declaration of rights, injunction, conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24, an order for compensation; and an order of Judicial review.

Disposition

65. This court therefore finds that Notice of Motion dated 23rd March 2023 has merit.
66. Accordingly, I enter judgement in favour of the Applicants as follows;
 - i. Orders of Certiorari directed against the 2nd respondent their servants and/ or agents or any other person acting under their authority to bring before this court for purpose of being quashed the decision by the respondent to



charge the applicants with a criminal case which was registered before the 5th Respondent's court as criminal case no. E064 of 2022 do issue.

- ii. Orders of prohibition directed to the 5th Respondent prohibiting the 5th Respondent, servants and/or agents or any other officers acting with its authority from proceeding with the prosecution, institution of criminal proceedings /and or taking plea against the applicants/subject on matters regarding the aforesaid charge.
- iii. Costs to the Applicant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JULY 2023

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J. CHIGITI (SC)

JUDGE

